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Patrick W. Turner
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August 19, 2005

Mr. Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: Petition to Establish Generic Docket to Consider Amendments to
Interconnection Agreements Resulting From Changes of Law
Docket No. 2004-316-C

Dear Mr. Terreni:

Enclosed for filing are the original and ten copies of the Response of BellSouth Telecommunications, Inc. to ITC^DeltaCom's Petition for Rehearing or Reconsideration of Order No. 2005-247 in the above-referenced matter. By copy of this letter, BellSouth is serving this response on all parties of record to this docket.

Sincerely,

A handwritten signature in black ink that reads "Patrick W. Turner". The signature is written in a cursive, flowing style.

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record

DM5 #598116

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In Re:

Petition to Establish Generic Docket to
Consider Amendments to Interconnection
Agreements Resulting From Changes of Law

)
) Docket No. 2004-316-C
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)
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)

RESPONSE OF BELL SOUTH TELECOMMUNICATIONS, INC.
TO ITC^DELTA COM'S PETITION FOR REHEARING OR RECONSIDERATION OF
ORDER NO. 2005-247

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this response to *Petition for Rehearing or Reconsideration of Order No. 2005-247* ("Petition") that ITC^DeltaCom ("DeltaCom") filed on August 15, 2005. For the reasons set forth below, the Public Service Commission of South Carolina should deny the Petition.

DeltaCom's Petition does not allege any new facts, and it does not present any new arguments. To the contrary, it merely refers to its previous arguments and claims that the Commission erred when it established a deadline for ordering certain arrangements from BellSouth as UNEs at TELRIC prices prior to the completion of change of law proceedings.¹ This claim, however, clearly is misplaced. As discussed in detail in the Brief BellSouth filed in

¹ See ITC^DeltaCom's *Petition for Rehearing or Reconsideration of Order No. 2005-24*, August 15, 2005, at ¶ 5. ("For the reasons stated previously by DeltaCom, DeltaCom believes [this aspect of] Order No. 2005-247 is unreasonable and unlawful."). While BellSouth believes this deadline should have been March 10, 2005 (and not June 8, 2005), the Commission acted properly in establishing this deadline prior to the completion of the change of law process. The Commission also made it clear that the extended deadline "is provided only for orderly negotiation and service transition purposes, and will be subject to true-up back to March 11, based on the new contractual arrangements negotiated by the parties." *Order* at 2-3. Consistent with the Commission's *Order*, BellSouth ceased accepting "new adds" in South Carolina on June 9, 2005. See Exhibit A (Carrier Notification Letters of June 1, 2005 and June 3, 2005).

this docket on April 11, 2005, this aspect of the Commission's Order is consistent with the decision of the United States District Court for the Northern District of Georgia² and with the decisions of at least sixteen other State commissions. Moreover, after BellSouth filed that Brief, the Kentucky and Mississippi Commission Orders that were inconsistent with BellSouth's position (and that were discussed in BellSouth's Brief) have been enjoined by the federal courts in those states.³ This aspect of this Commission's *Order* is consistent with these two federal court decisions. Significantly, the Federal Communications Commission has done nothing whatsoever to suggest that this Commission, three federal courts, and numerous other State commissions have misread or misapplied the plain language of the *TRRO*.

DeltaCom's Petition restates its argument that this Commission's Order is inconsistent with the change of law provisions in certain interconnection agreements.⁴ This argument is addressed in, and squarely refuted by, the Commission's Order. Specifically, the Order provides that

we agree with the New York Commission, which stated that "Paragraph 233 must be read together with the FCC directives that UNE-P obligations for new customers are eliminated as of March 11, 2005." Thus, the right to assert contractual obligations must be read congruently with one of the overall goals of the *TRRO*, which was that certain classes of UNEs were no longer to be made available after March 11, 2005, at TELRIC prices.⁵

The Commission also held that "the FCC has the authority to make its [*TRRO*] order effective immediately regardless of the contents of particular interconnection agreements" and that "the FCC may undo the effects of its own prior decisions, which have been vacated by the Federal

² Exhibit B to this Response is a copy of the Georgia federal court decision ("Georgia Court Order").

³ Exhibit C to this Response is a copy of the Kentucky federal court decision ("Kentucky Court Order"). Exhibit D to this Response is a copy of the Mississippi federal court decision ("Mississippi Court Order").

⁴ See Petition at p. 2, ¶5.

⁵ *Order* at p. 5.

Courts on several occasions.”⁶ These aspects of the Commission’s Order are well-founded in law and are consistent with the decisions of various federal courts and other State commissions.⁷

DeltaCom also argues that this Commission “erred in its findings by stating the Federal Communications Commission had determined that UNE Platform harms competition and is therefore contrary to the public interest.”⁸ This argument must fail. As the Commission’s Order notes, the FCC explained that its previous and overbroad unbundling rules (that have consistently been overturned by federal courts) “frustrate[d] sustainable, facilities-based competition.”⁹ Additionally, the FCC clearly explained its views on UNE-P as follows:

In addition to these concerns, which go directly to the Commission’s consideration of operational factors of impairment, the Commission also finds that even if some limited impairment might exist in some markets, we would decline to require unbundling of mass market local circuit switching pursuant to our “at a minimum” authority, based on the investment disincentives that unbundled local circuit switching, and particularly UNE-P, creates. Five years ago, the Commission expressed a preference for facilities-based competition. This preference has been validated by the D.C. Circuit as the correct reading of the statute. Since its inception, UNE-P was designed as a tool to enable a transition to facilities-based competition. It is now clear, as discussed below, that, in many areas, UNE-P has been a disincentive to competitive LECs’ infrastructure investment. Accordingly, consistent with the D.C. Circuit’s directive, we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition.¹⁰

These provisions of the *TRRO* clearly support the Commission’s finding that “[t]he FCC has determined that the UNE Platform harms competition and thus is contrary to the

⁶ *Id.*

⁷ See Georgia Court Order at 5-6; Kentucky Court Order at 11-12; Mississippi Court Order at 12-16.

⁸ Petition at p. 3.

⁹ Order at p. 5 (quoting *TRRO*, ¶2).

¹⁰ *TRRO* at ¶218. (emphasis added)

public interest.”¹¹ The Georgia, Kentucky, and Mississippi Court Orders also support this finding.¹²

CONCLUSION

DeltaCom acknowledges that it filed its Petition merely “to preserve its right of appellate review.”¹³ As such, Petition simply repeats arguments the Commission has already considered and, quite properly, rejected. The Commission, therefore, should deny the Petition.

Respectfully submitted,



Patrick W. Turner
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(803) 401-2900
BELLSOUTH TELECOMMUNICATIONS, INC.

DM5 #598345

¹¹ *Order* at p. 5.

¹² Georgia Court Order at 7-9; Kentucky Court Order at 17-19; Mississippi Court Order at 19-20.

¹³ Petition at p.3, ¶8.

EXHIBIT A

BellSouth Interconnection Services

675 West Peachtree Street
Atlanta, Georgia 30375

**Carrier Notification
SN91085121**

Date: June 1, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – Triennial Review Remand Order (TRRO) - Unbundling Rules – States of Alabama and South Carolina

On April 15, 2005, BellSouth released Carrier Notification letter **SN91085089** advising CLECs that, effective April 17, 2005, BellSouth would no longer accept new service requests from CLECs for mass market unbundled local switching and Unbundled Network Element-Platform (UNE-P) in the states of Florida, Georgia, Mississippi and North Carolina. Further, on April 26, 2005, BellSouth released Carrier Notification letter **SN91085094** advising CLECs that, effective April 27, 2005, BellSouth would no longer accept new service requests from CLECs for mass market unbundled local switching and UNE-P in the state of Kentucky. Then, on May 17, 2005, BellSouth released Carrier Notification letter **SN91085108** advising CLECs that, effective May 19, 2005, BellSouth would no longer accept new service requests from CLECs for mass market unbundled local switching and UNE-P in the state of Tennessee. Finally, on May 23, 2005, BellSouth released Carrier Notification letter **SN91085111** advising CLECs that, effective May 25, 2005, BellSouth would no longer accept new service requests from CLECs for mass market unbundled local switching and UNE-P in the state of Louisiana.

This letter is to advise that, effective June 3, 2005, pursuant to the Alabama Public Service Commission's Order dated May 25, 2005, and to the extent applicable, subject to company-specific exceptions as noted in the Order, BellSouth will no longer accept new service requests from CLECs for mass market unbundled local switching and UNE-P in the state of Alabama. Further, this letter is to advise that, effective June 9, 2005, pursuant to the South Carolina Public Service Commission's Directive dated April 13, 2005, BellSouth will no longer accept new service requests from CLECs for mass market unbundled local switching and UNE-P in the state of South Carolina.

BellSouth will continue to offer the following options to CLECs who wish to serve their customers with the combinations of switching and loops that constituted UNE-P:

- Short Term Commercial Agreement to permit the CLEC to place new orders for switching and port/loop combinations.
- Long Term Commercial Agreement (through December 31, 2007)

To obtain more information about this notification, please contact your BellSouth contract negotiator.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

BellSouth Interconnection Services

675 West Peachtree Street
Atlanta, Georgia 30375

**Carrier Notification
SN91085121**

Date: June 3, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – **REVISED** - Triennial Review Remand Order (TRRO) - Unbundling Rules – States of Alabama and South Carolina (Originally posted on June 1, 2005)

On April 15, 2005, BellSouth released Carrier Notification letter **SN91085089** advising CLECs that, effective April 17, 2005, BellSouth would no longer accept new service requests from CLECs for mass market unbundled local switching and Unbundled Network Element-Platform (UNE-P) in the states of Florida, Georgia, Mississippi and North Carolina. Further, on April 26, 2005, BellSouth released Carrier Notification letter **SN91085094** advising CLECs that, effective April 27, 2005, BellSouth would no longer accept new service requests from CLECs for mass market unbundled local switching and UNE-P in the state of Kentucky. Then, on May 17, 2005, BellSouth released Carrier Notification letter **SN91085108** advising CLECs that, effective May 19, 2005, BellSouth would no longer accept new service requests from CLECs for mass market unbundled local switching and UNE-P in the state of Tennessee. Finally, on May 23, 2005, BellSouth released Carrier Notification letter **SN91085111** advising CLECs that, effective May 25, 2005, BellSouth would no longer accept new service requests from CLECs for mass market unbundled local switching and UNE-P in the state of Louisiana.

This letter is to advise that, effective June 3, 2005, pursuant to the Alabama Public Service Commission's Order dated May 25, 2005, and, to the extent applicable, subject to company-specific exceptions as noted in such Order, BellSouth will no longer accept new service requests from CLECs for mass market unbundled local switching and UNE-P in the state of Alabama. Further, this letter is to advise that, effective June 9, 2005, pursuant to the South Carolina Public Service Commission's **(SCPSC)** Directive dated April 13, 2005, BellSouth will no longer accept new service requests from CLECs for mass market unbundled local switching and UNE-P in the state of South Carolina. **However, in South Carolina, consistent with the SCPSC's Directive, BellSouth will continue to accept new service requests from CLECs for moves, changes and additions of mass market unbundled local switching and UNE-P for embedded base customers that are currently served by UNE-P. Further, consistent with the SCPSC's Directive, BellSouth will accept new service requests from CLECs for the embedded base of UNE-P customers at the customer's existing location or at the customer's new location. Such service requests must be submitted manually, but will be charged at the mechanized rate.**

BellSouth will continue to offer the following options to CLECs who wish to serve their customers with the combinations of switching and loops that constituted UNE-P:

- Short Term Commercial Agreement to permit the CLEC to place new orders for switching and port/loop combinations.
- Long Term Commercial Agreement (through December 31, 2007)

To obtain more information about this notification, please contact your BellSouth contract negotiator.

Sincerely,

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

EXHIBIT B

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

BELLSOUTH TELECOMMUNICATIONS, INC.,

Plaintiff,

v.

MCIMETRO ACCESS TRANSMISSION
SERVICES, LLC, et al.,

Defendants.

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) No. 1:05-CV-0674-CC
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ORDER

Before the Court is the Emergency Motion for a Preliminary Injunction filed by plaintiff BellSouth Telecommunications, Inc. ("BellSouth"). Having reviewed the motion, the opposing memoranda, and the extensive record material that has been filed, and having heard argument on April 1, 2005, the Court finds that BellSouth has satisfied each aspect of the four-prong test for preliminary injunctive relief. *See, e.g., Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205 (11th Cir. 2003); *American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir. 1998).

Accordingly, the Court grants BellSouth a preliminary injunction against the March 9, 2005 Order of the Georgia Public Service Commission ("PSC") in Docket

No. 19341-U to the extent that PSC Order requires BellSouth to continue to process new competitive LEC orders for switching as an unbundled network element (“UNE”) as well as new orders for loops and transport as UNEs (in instances where the Federal Communications Commission (“FCC”) has found that unbundling of loops and transport is not required). Consistent with the FCC’s ruling in the *Order on Remand*¹ at issue here, to the extent that a competitor has a good faith belief that it is entitled to order loops or transport, BellSouth will provision that order and dispute it later through appropriate channels.

First, BellSouth has a high likelihood of success in showing that, contrary to the conclusion of the PSC, the FCC’s *Order on Remand* does not permit new UNE orders of the facilities at issue.² BellSouth’s position is consistent with the conclusions of a significant majority of state commissions that have decided this issue (BellSouth has provided the Court with decisions from 11 state commissions that

¹ Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (FCC rel. Feb. 4, 2005).

² In evaluating the merits of BellSouth’s legal argument, this Court owes no deference to the PSC’s understanding of federal law. *See, e.g., MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 112 F. Supp. 2d 1286, 1291 (N.D. Fla. 2000), *aff’d*, 298 F.3d 1269 (11th Cir. 2002).

support its conclusion) and with what the Court is likely to conclude is the most reasonable interpretation of the FCC's decision.

The language of the *Order on Remand* repeatedly indicates that the FCC did not allow new orders of facilities that it concluded should no longer be available as UNEs. The FCC held that there would be a "nationwide bar" on switching (and thus UNE Platform) orders, *Order on Remand* ¶ 204. The FCC's new rules thus state that competitors "may not obtain" switching as a UNE. 47 C.F.R. § 51.319(d)(2)(iii) (App. B. to *Order on Remand*); *see also* 47 C.F.R. § 51.319(d)(2)(i) ("An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops."); *Order on Remand* ¶ 5 ("Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching"); *id.* ¶ 199 ("[W]e impose no section 251 unbundling requirement for mass market local circuit switching nationwide"). The FCC likewise established that competitive LECs are no longer allowed to place new orders for loops and transport in circumstances where, under the FCC's decision, those facilities are not available as UNEs. *Id.* ¶¶ 142, 195.

The FCC also created strict transition periods for the “embedded base” of customers that were currently being served using these facilities. Under the FCC transition plan, competitive LECs may use facilities that have already been provided to serve their existing customers for only 12 more months and at higher rates than they were paying previously. *See id.* ¶¶ 142, 195, 199, 227. The FCC made plain that these transition plans applied only to the embedded base and that competitors were “not permit[ed]” to place new orders. *Id.* ¶¶ 142, 195, 199. The FCC’s decision to create a limited transition that applied *only* to the embedded base and required higher payments even for those existing facilities cannot be squared with the PSC’s conclusion that the FCC permitted an indefinite transition during which competitive LECs could order new facilities and did not specify a rate that competitors would pay to serve them.

In arguing for a different result, the PSC and the other defendants primarily rely on paragraph 233 of the *Order on Remand*, which they contend requires BellSouth to follow a contractual change-of-law process before it can cease providing these facilities. That provision, however, states that “carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.” *Order on Remand* ¶ 233. In conflict with that language, the PSC’s reading of the FCC’s

order would render paragraph 233 inconsistent with the rest of the FCC's decision. Instead of not being permitted to obtain new facilities, as the FCC indicated should be the rule, *see, e.g., Order on Remand* ¶ 199, competitive LECs would be permitted to do so for as long as the change-of-law process lasts. Moreover, it is significant that the FCC expressly referred to the possible need to modify agreements to deal with the transition as to the embedded base, *see id.* ¶ 227, but did not mention a need to do so to effectuate its "no new orders" rule, *see id.* In sum, the Court believes that there is a significant likelihood that it will agree with the conclusion of the New York Public Service Commission that paragraph 233 "must be read together with the FCC directives that [UNE Platform] obligations for new customers are eliminated as of March 11, 2005." *New York Order*³ at 13, 26. Any result other than precluding new UNE Platform customers on March 11 would "run contrary to the express directive . . . that no new [UNE Platform] customers be added" and thus result in a self-contradictory order. *Id.*

Finally, the Court notes that the PSC does not dispute that the FCC has the authority to make its order immediately effective regardless of the contents of particular interconnection agreements. *See* PSC Order at 3. The Court concludes that

³ Order Implementing TRRO Changes *Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand*, Case No. 05-C-0203 (N.Y. PSC Mar. 16, 2005) ("*New York Order*").

it is likely to find that the FCC did that here. The Court further notes that it would be particularly appropriate for the FCC to take that action because it was undoing the effects of the agency's own prior decisions, which have repeatedly been vacated by the federal courts as providing overly broad access to UNEs. *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *see also USTA v. FCC*, 359 F.3d 554, 595 (D.C. Cir. 2004) (highlighting the FCC's "failure, after eight years, to develop lawful unbundling rules, and [its] apparent unwillingness to adhere to prior judicial rulings"). In any event, any challenge to the FCC's authority to bar new UNE- Platform orders must be pursued on direct review of the FCC's order, not before this Court.

In concluding that BellSouth has a substantial likelihood of success on the merits, the Court does not reach the issue whether an "Abeyance Agreement" between BellSouth and a few of the defendants authorizes those defendants to continue placing new orders. That issue is pending before the PSC, and this Court's decision does not affect the PSC's authority to resolve it.

Second, BellSouth has demonstrated that it is currently suffering significant irreparable injury as a result of the PSC's decision. BellSouth has shown that as a

direct result of the PSC's decision, it is currently losing retail customers and accompanying goodwill. For instance, BellSouth has demonstrated that it is losing approximately 3200 customers per week to competitors that are using the UNE Platform. The defendants do not seriously dispute that BellSouth is losing these customers; on the contrary, MCI confirms that it is using the UNE Platform to sign up 1500 BellSouth customers per week. Under Eleventh Circuit precedent, losses of customers are irreparable injury. *See, e.g., Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (holding that loss of customers is irreparable injury and agreeing with district court that, if a party "lose[s] its long-time customers," the injury is "difficult, if not impossible, to determine monetarily") (internal quotation marks omitted); *see also Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (finding irreparable harm where FCC rules implementing this same statute "will force the incumbent LECs to offer their services to requesting carriers at prices that are below actual costs, causing the incumbent LECs to incur irreparable losses in customers, goodwill, and revenue"). BellSouth has therefore demonstrated the existence of very significant immediate and irreparable injury.

Third, the Court finds that BellSouth's injury outweighs the injury that will be suffered by the private defendants. The Court concludes that, although some

competitive LECs may suffer harm in the short-term as a result of this decision, they will do so only if they intended to compete by engaging in conduct that the FCC has concluded is anticompetitive and contrary to federal policy. In particular, paragraph 218 of the *Order on Remand* states that the UNE Platform “hinder[s] the development of genuine, facilities-based competition,” contrary to the federal policy reflected in the Telecommunications Act of 1996. Thus, although defendants are free to compete in many other ways, their interest in continuing practices that the FCC has condemned as anticompetitive are entitled to little, if any, weight, and do not outweigh BellSouth’s injury. See, e.g., *Graphic Communications Union, Local No. 2 v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985) (holding that private interest in avoiding arbitration could not count as evidence of “irreparable harm,” because such a holding “would fly in the face of the strong federal policy in favor of arbitrating disputes”). Moreover, the Court notes that competitive LECs have been on notice at least since the FCC’s August 2004 *Interim Order*⁴ that soon they might well not be able to place new orders for these UNEs.

⁴ Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783, ¶ 29 (2004) (proposing a transition plan that “does not permit competitive LECs to add new customers”).

Fourth, the Court concludes that BellSouth's motion is consistent with and will advance the public interest, as authoritatively determined by the FCC. As discussed, the FCC has determined that the UNE Platform harms competition and thus is contrary to the public interest. The FCC explained that its prior, overbroad unbundling rules had "frustrate[d] sustainable, facilities-based competition," *Order on Remand* ¶ 2, that its new rules would "best allow[] for innovation and sustainable competition," *id.*, and that it would be "contrary to the public interest" to delay the effectiveness of the *Order on Remand* for even a "short period of time," *id.* ¶ 236. The FCC further concluded that immediate implementation of the *Order on Remand* is necessary to avoid "industry disruption arising from the delayed applicability of newly adopted rules." *Order on Remand* ¶ 236 (emphasis added). Unless and until a federal court of appeals overturns the FCC *Order on Remand* on direct review, the FCC's judgment establishes the relevant public-interest policy here.

* * *

As BellSouth has satisfied the test for preliminary injunctive relief, it is hereby ORDERED AND ADJUDGED that Plaintiff's Emergency Motion for Preliminary Injunction is GRANTED. The Court hereby preliminarily enjoins the Georgia Public Service Commission and the other defendants from seeking

to enforce the PSC Order to the extent that order requires BellSouth to process new UNE orders for switching and, in the circumstances described above, for loops and transport.

For the same reasons as those set forth above with respect to this Court's grant of preliminary injunctive relief to BellSouth, the Joint Defendants' Motion for Stay is DENIED.

BellSouth's motion for preliminary injunction having now been considered and determined, all Defendants are DIRECTED to answer or otherwise respond to BellSouth's Complaint within seven (7) days of the date of this Order. Any answers or responses already submitted to the Court by Defendants shall be deemed filed as of the date of this Order for all purposes under the Federal Rules of Civil Procedure and the local rules of this Court.

ORDERED this 5th day of April 2005.

s/ CLARENCE COOPER

CLARENCE COOPER
UNITED STATES DISTRICT JUDGE

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

BELLSOUTH TELECOMMUNICATIONS,)	
INC.,)
)
Plaintiff,) Civil Action No. 3:05-CV-16-JMH
)
v.)
)
CINERGY COMMUNICATIONS CO.,) MEMORANDUM OPINION AND ORDER
a/k/a CINERGY COMMUNICATIONS,)
CORP., ET AL.)
)
Defendants.)
)

** ** ** ** **

This matter is before the Court on Plaintiff's motion for a preliminary injunction [Record No. 2]. Having reviewed the motion, responses, reply, and voluminous record, and having heard oral argument on the matter on April 18, 2005, the Court finds that a preliminary injunction is warranted.

I. Factual and Procedural Background

The Telecommunications Act ("the Act") places a duty on incumbent local exchange carriers ("ILECs"), like the plaintiff BellSouth Telecommunications, Inc. ("BellSouth"), that have traditionally provided local telephone services to an area, to lease unbundled network elements ("UNE") on a cost basis to new entrants into the market, called competitive local exchange carriers ("CLECs"). 47 U.S.C. § 251. The Act authorizes the Federal Communications Commission ("FCC" or "the Commission") to determine the network elements and the proper candidates for this

low rate of services. A "network element" is defined as "a facility or equipment used in the provision of a telecommunications services." *Id.* The unbundled network elements platform ("UNE-P") is composed of switching functions, shared transport, and loops. The only network element at issue in the preliminary injunction is switching.

The Act states that the FCC should consider "at a minimum, whether ... access to such network elements as are proprietary in nature is necessary; and ... [whether] the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." *Id.*

In the late 1990s, the FCC imposed blanket unbundling, which is requiring ILECs to make available as UNEs, *all* or a certain listed number of the piece parts of their local networks in certain geographic areas. The Supreme Court invalidated this practice in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366 (1999), because the FCC had not properly considered whether unbundling was necessary or whether the CLECs were impaired. *Id.* at 388-92.

In response, the FCC ruled that impairment was shown if without unbundling, the CLEC's ability to provide services was materially diminished. *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 419 (D.C. Cir. 2002) ("*USTA I*"). The D.C. Circuit subsequently struck the FCC's attempt to correct their

interpretation of "impair" and held that the FCC must differentiate between cost disparities for entrants into any market and the telecommunications market. *Id.* at 426-27.

The FCC then issued a Review Order that held that CLECs were impaired without unbundled access to ILEC switches for the mass market, but delegated to each state the authority to make more nuanced impairment determinations. *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 564 (D.C. Cir. 2004) ("*USTA II*").

The D.C. Circuit in *USTA II* vacated the FCC rule allowing states to conduct impairment analyses as well as the Commission's national finding of impairment for mass market switching. The court found that the ultimate authority to determine impairment lies with the FCC and, thus, delegation to the states was improper. Further, the court held the Commission's national finding of impairment was improper because it was impermissibly broad. *Id.* at 569-72.

Subsequently, the FCC issued the Order on Remand, the Order at issue in this case, which held that CLECs "are not impaired in the deployment of switches" and that "the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify a nationwide bar on such unbundling." Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket

No. 01-338, FCC 04-290, at ¶ 112 (FCC Feb. 4, 2005) ("Order on Remand").

The Order on Remand stated that "[g]iven the need for prompt action, the requirements ... shall take effect on March 11, 2005." *Id.* at ¶ 134. The Order discussed a transition plan for "embedded" or existing customers, wherein CLECs must submit orders to convert to alternative service arrangements in which time the parties would modify their interconnection agreements. The time period set for the transition was twelve months. *Id.* at ¶¶ 128-29.

Prior to the Order on Remand, BellSouth filed a petition with the Kentucky Public Service Commission ("PSC") to establish a generic docket, asking it to decide whether interconnection agreements pursuant to §§ 251 and 252 of the Act were deemed amended on the effective date of the FCC Unbundling Rules, to the extent the rates in the agreements conflicted with rates in the FCC Order.

As soon as the Order on Remand was issued and prior to resolution of the generic petition it filed with the PSC, BellSouth notified CLECs that as of March 11, 2005, it would no longer accept new switching orders to those facilities that were not required by the FCC order. Cinergy, one of the defendants in this case, filed a motion for emergency relief to the PSC, requesting that the Commission order BellSouth to continue accepting and processing their orders, including new orders pursuant to the change of law

provisions in their agreement. Various other CLECs also asked for the same relief.

On March 10, 2005, the PSC issued two orders granting the relief the CLECs requested. Order, *In re Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 2004-00427 (Ky. PSC Mar. 10, 2005); Order, *In re Joint Petition of NewSouth Communications Corp., et al.*, Docket No. 2004-00044 (Ky. PSC Mar. 10, 2005). The PSC found that the change of law provisions in the interconnection agreements controlled and must be followed in order to modify the agreements to reflect changes implemented by the Order on Remand. The PSC rejected BellSouth's position that the Order on Remand was immediately effective on March 11, 2005, for new orders.

BellSouth then filed a complaint in this Court against the PSC and various CLECs seeking declaratory and injunctive relief from the two PSC orders for switching, loops, and transports. BellSouth simultaneously filed an emergency motion for preliminary injunction seeking relief from the PSC orders in so far as the orders refer to switching.¹

II. Applicable Law

In order to determine whether a preliminary injunction should

¹ Because the motion for a preliminary injunction does not seek relief as to loops or transports, the injunction is inapplicable to the defendant US LEC of Tennessee, Inc.

be granted, the Court considers the following factors:

(1) whether the movant has a "strong" likelihood of success on the merits; (2) whether the movant would otherwise suffer irreparable injury; (3) whether issuance of a preliminary injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuance of a preliminary injunction.

Leary v. Daeschner, 228 F.3d 729, 736 (6th Cir. 2000). The factors are not prerequisites to entry of a preliminary injunction, but instead should be balanced against each other. *Id.*; *United States v. Edward Rose & Sons*, 384 F.3d 258, 261 (6th Cir. 2004). The party seeking a preliminary injunction has the burden of persuasion to show that the factors weigh in favor of the Court granting the motion. *Leary*, 228 F.3d at 739. While the Court balances the factors, the plaintiff must prove irreparable harm in order to obtain an injunction. *ExtraCorporeal Alliance, LLC v. Rosteck*, 285 F. Supp. 2d 1028, 1040 (N.D. Ohio 2003).

A. Strong Likelihood of Success on the Merits

Whether BellSouth has a strong likelihood of success on the merits is dependent on whether the FCC's Order on Remand is self-effectuating for new orders or whether it should be effectuated through the change of law process in the defendants' interconnection agreements. BellSouth asserts the former, while the defendants assert the latter.

After a thorough review of the language in the Order on Remand, the Court finds that BellSouth has a strong likelihood of success on the merits. For example, the Executive Summary in the

Order on Remand states that:

Incumbent LECs have *no obligation* to provide competitive LECs with unbundling access to mass market local switching. We adopt a 12-month plan for competing carriers to transition away from use of unbundling mass market local circuit switching. This transition plan applies only to the embedded customer base, and *does not permit competitive LECs to add new switching UNEs*.

Order on Remand at ¶ 5 (emphasis added). The Order on Remand also states that the Commission "impose[s] no section 251 unbundling requirement for mass market local circuit switching nationwide." *Id.* at ¶ 199. Concerning the effective date, the Order on Remand states that "[g]iven the need for prompt action, the requirements set forth here shall take effect on March 11, 2005, rather than 30 days after publication in the Federal Register." *Id.* at ¶ 235. The strong language in the Order on Remand that ILECs no longer have an obligation to provide UNE-P switching and the corresponding effective date of March 11, 2005, will likely lead the Court to conclude that Order on Remand is self-effectuating for new orders.

Further, the Order reiterates that the "transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundling access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order." *Id.* at ¶ 227. During the transition period, ILECs are paid a higher rate for existing orders than that paid prior to the Order on Remand. *Id.* at ¶ 228. If the defendants' interpretation is accepted, then

BellSouth would be paid less for servicing new orders than existing orders. Also, the transition plan sets a specific time period within which the interconnection agreements shall be changed in order to effectuate the Order on Remand. If the defendants' position is accepted, it is possible that BellSouth would be processing new orders longer than it is required to accept existing orders at the lower prices mandated by the interconnection agreements.

The defendants point to paragraph 233 which provides:

We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements *consistent with our conclusions in this Order*. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in necessary delay.

Order on Remand at ¶ 233 (emphasis added). The defendants argue that the language in this paragraph should be read to mean that the transition plan applies to existing orders and that new orders should be effected pursuant to the parties' interconnection agreements, focusing on the sentence "carriers must implement changes to their interconnection agreements consistent with our

conclusions in this Order." *Id.*

This paragraph, however, should be read in the context of the entire Order on Remand and not in isolation. BellSouth is likely to succeed in arguing that the language "carriers must implement changes to their interconnection agreements *consistent with our conclusions in this Order*" simply refers to existing customers that, pursuant to the transition plan, must be effectuated through the change of law processes in the interconnection agreements. The paragraph should also be read together with the mandate that the transition plan shall only apply to existing orders and that the Order on Remand shall be effective March 11, 2005, "[g]iven the need for prompt action." *Id.* at ¶ 235.

The defendants also argue that paragraph 227's statement that the transition plan does not permit "new UNE-P arrangements using unbundling access to local circuit switching pursuant to section 251(c)(3) *except as otherwise specified in this Order*" refers to paragraph 233's mandate that interconnection agreements be used to effectuate the process. The more reasoned analysis, however, is that paragraph 227 refers to paragraph 228 that states "the transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period." *Id.* at ¶ 228. Thus, paragraph 227 is interpreted to mean that parties are free to negotiate a longer or shorter transition period.

The Court is not alone in its analysis of BellSouth's likelihood of success; two of the four district courts that have dealt with this issue have ruled similarly. *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC*, No. 1:05-CV-0674, at 1-6 (N.D. Ga. April 5, 2005) (granting injunction to BellSouth); *BellSouth Telecomms., Inc. v. Miss. Pub. Serv. Comm'n*, No. 3:05-CV-173, at 6-11 (S.D. Miss. April 13, 2005) ("Miss. PSC") (granting injunction to BellSouth); *contra MCIMetro Access Transmission Servs., LLC v. Mich. Bell Tel. Co.*, No. 05-CV-709885 (E.D. Mich. Mar. 11, 2005) (order without opinion that grants an injunction to CLECs, but is later withdrawn due to parties' settlement); *Ill. Bell Tel. Co. v. Hurley*, No. 05-C-1149, at 7-12 (E.D. Ill. Mar. 29, 2005). Further, a clear majority of state commissions have agreed that the Order on Remand is self-effectuating for new orders.²

² For instance, Indiana, New York, Ohio, California, New Jersey, Texas, Rhode Island, Kansas, Massachusetts, Michigan, and Maine all are in accord with BellSouth's interpretation of the Order on Remand. See *Miss. PSC*, No. 3:05-CV-173, at 8-9 n.6, for commission orders cited therein. Delaware, North Carolina, and Florida also have held that the Order on Remand is self-effectuating for new orders. See Open Meeting, *Complaint of A.R.C. Networks, Inc., d/b/a/ InfoHighway Communications, and XO Communications, Inc., Against Verizon Delaware Inc., for Emergency Declaratory Relief Related to the Continued Provision of Certain Unbundled Network Elements After the Effective Date of the Order on Remand (FCC 04-290 2005)*, Docket No. 334-05 (Del. PSC Mar. 22, 2005); Notice of Decision and Order, *In the Matter of Complaints Against BellSouth Telecommunications, Inc. Regarding Implementation of the Triennial Review Remand Order*, Docket No. P-55, Sub-1550, at 4-5 (N.C. PSC Apr. 15, 2005); Vote Sheet, *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes in Law*, by BellSouth Telecommunications, Inc., Docket No. 041269-TP, at Issue 2 (Fla. PSC Apr. 5, 2005).

The defendants assert that even if the Order on Remand is read to conclude that new orders are not permitted, the FCC is without authority to abrogate interconnection agreements. This is a collateral attack that is not appropriately before the Court and should instead be brought as a direct appeal of the FCC's Order. *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 394 F.3d 568, 569 (8th Cir. 2004).

Even if this is not a collateral attack on the FCC's Order, the FCC had authority to mandate that the Order on Remand would be self-effectuating for new orders because the FCC has been given the authority to implement the Act. *Iowa Utils. Bd.*, 525 U.S. at 385. Thus, "[t]o the extent a state commission's judgment concerning the interpretation of an approved agreement conflicts with the FCC's interpretation of the FCC regulations, the FCC's interpretation

Commissions that agree with the Kentucky PSC are Tennessee, Louisiana, Illinois, Alabama, and South Carolina. See Transcript of Proceedings, *In re BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 04-00381 (Tenn. PSC Apr. 11, 2005); Letter, *Staff's Recommendation Regarding MCI's Motion for Emergency Relief*, Docket No. 28131 (La. PSC 2005); *Illinois Bell Telephone Co. v. Hurley*, Docket No. 05-C-1149, at 7-12 (N.D. Ill. Mar. 29, 2005); Order, *Temporary Standstill Order and Order Scheduling Oral Argument*, Docket No. 29393 (Ala. PSC Mar. 9, 2005); *Commission Directive, Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 2004-316-C (S.C. PSC Apr. 13, 2005) (merely establishing ninety day period within which ILECs must continue to accept new orders from CLECs).

controls under the Supremacy Clause." *Miss. PSC*, No. 3:05-CV-173, at 15 (citing *MCI Telecommuns. Corp. v. Bell Atl.-Penn. Serv.*, 271 F.3d 491, 516 (3d Cir. 2001)). Further, the FCC was merely undoing the effect of its prior repudiated rules that were negotiated into the regulated interconnection agreements.³ *Id.* at 13-14.

While the defendants also argue that the Act places independent obligations for ILECs to provide unbundling services pursuant to § 271, this Court is not the proper forum to address this issue in the first instance. The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first. *Miss. PSC*, No. 3:05-CV-173, at 17.

Lastly, the NewSouth joint defendants argue that they are not subject to the preliminary injunction because an Abeyance Agreement and subsequent Abeyance Order was entered by the PSC that specifically states that the joint defendants and BellSouth agree

³ The defendants argue that the only way the FCC may abrogate contracts is through the *Mobile-Sierra* doctrine, which has not been followed because the FCC did not make a particularized finding that abrogating the contracts was in the public interest. However, the Court is likely to find that due to the fact that the interconnection agreements are not privately negotiated contracts, the *Mobile-Sierra* doctrine is not applicable. See e.g., *Atl. City Elec. Co. v. FERC*, 295 F.3d 1, 14 (D.C. Cir. 2002) (The *Mobile-Sierra* doctrine provides authority to federal agencies to abrogate "freely negotiated private contracts" provided the agency makes "a particularized finding that the public interest required the modification" of the contracts.). See also *e.spire Communications, Inc. v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004) (holding that interconnection agreements are not private contracts but, instead, arise from ongoing federal and state regulations).

that their prior interconnection agreements would be in place until the change of law resulting from the *USTA II* progeny was incorporated into new agreements. As the two district courts dealing with the exact issue have held, this Court does not have to reach whether the Abeyance Agreement and Order authorizes new orders to be placed because this very issue is before the PSC. Thus, our decision on the preliminary injunction "does not affect the PSC's authority to resolve it." *MCIMetro*, No. 1:05-CV-0674, at 6; *Miss. PSC*, No. 3:05-CV-173, at 17-18 n.11.

B. Balancing the Harms

In deciding whether a preliminary injunction is appropriate, the Court must balance the harm to the plaintiff if the injunction is denied and the harm to the defendants if the injunction is granted. *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001). The harm to the plaintiff must be irreparable; it is not sufficient if the plaintiff merely shows that it will suffer economic damages in the absence of an injunction. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992). An injunction is inappropriate, thus, if the plaintiff will suffer purely economic harm that is compensable through monetary damages. "[A]n exception exists where the potential economic loss is so great as to threaten the existence of the movant's business." *Performance Unlimited, Inc. v. Questar Publ'rs, Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995).

1. Harm to BellSouth

The defendants argue that BellSouth has only asserted damages that are fully compensable with a monetary award. The defendants assert that the damages are readily calculable by comparing the higher rate BellSouth would be able to charge CLECs for new UNE-P switching orders versus the lower rate BellSouth is required to charge pursuant to the interconnection agreements.

The defendants' argument misses the mark because the plaintiff does not merely assert monetary damages. It is true that BellSouth alleges damages flowing from the difference in price between the lower price mandated by the interconnection agreements and the higher price the company could charge if the bar on unbundling was immediately lifted. These damages alone would not be sufficient to warrant an injunction because they are readily calculable.

BellSouth, however, also alleges damages resulting from an inability to compete with the CLECs who can offer services at a lower rate than BellSouth because of the low cost of switching. As a result, BellSouth asserts that it will lose customers and goodwill if an injunction is not granted. BellSouth submitted proof that it would lose approximately 943 customers a week without an injunction. The defendants did not controvert this proof, but assert that the damages flowing from loss of customers are monetary.

The Court agrees with BellSouth that the damages flowing from

loss of customers is irreparable because it is impossible to predict the probable length of the lost customers' relationships with BellSouth or whether the customers would return to BellSouth after a decision on the merits in BellSouth's favor. *Basicomputer*, 973 F.2d at 512 (holding that "loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute"); *Mich. Bell Tel. Co.*, 257 F.3d at 599 (noting that "loss of established goodwill may irreparably harm a company"); *Lexington-Fayette Urban County Gov't v. BellSouth Telecomms., Inc.*, No. 00-5408, 2001 WL 873629, at *3 (6th Cir. July 26, 2001) (holding that the lower court did not abuse discretion in finding that BellSouth suffered irreparable harm through loss of customers because of a delayed entry into the marketplace) (unpub.); *Ferro v. Ass'd Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (finding that the movant established irreparable injury through loss of customers and good will).

The defendants cite *Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98, 103 (6th Cir. 1991), that upheld a finding of a lack of irreparable harm through loss of customers. In *Southern Milk*, an agricultural cooperative brought suit to enjoin a competitor from interfering with cooperative agreements that provided the plaintiff with the exclusive rights to act as the sole agent for dairy farmers in Michigan. The Sixth Circuit held that there was no irreparable harm because the market was not limited and it was

unclear whether an injunction would prevent customers from taking their business elsewhere. *Id.*

Southern Milk is contrary to later Sixth Circuit cases, cited by the Court above, that hold that irreparable harm may be found from loss of customers and goodwill and fail to mention a "limited market" exception. In two cases in particular, the movants were telecommunications companies and the Sixth Circuit upheld the lower courts' finding of irreparable harm due to loss of customers and goodwill without mentioning whether the market was limited. *Mich. Bell Tel. Co.*, 257 F.3d at 599; *Lexington-Fayette Urban County Gov't*, 2001 WL 873629, at *3. Because the cases conflict, the Court follows the later cited cases that uphold findings of irreparable harm from loss of customers and goodwill where a telecommunication company is concerned.

2. Harm to CLECs

The CLECs maintain that if an injunction is entered, they will suffer harm that far outweighs any harm suffered by BellSouth if the motion is denied. Specifically, the CLECs state that granting the injunction will upset the status quo instead of maintaining it; will deny the CLECs meaningful opportunities to negotiate the interpretation of the Order on Remand; would cause the CLECs to lose customers and goodwill from the inability to receive UNE-P services at a lower rate; and would result in customers being immediately be cut off from ordering new services.

BellSouth argues that the CLECs' only harm is the harm resulting from not being able to receive unbundling services for new orders at the lower rate mandated by the interconnection agreements. This harm, BellSouth argues, should not be balanced because requiring ILCEs to provide unbundling services to CLECs at a lower cost is contrary to the federal public policy of barring unbundling because it is anti-competitive. Additionally, BellSouth argues that the status quo was established by the Order on Remand and upset by the PSC orders.

The Court agrees with the plaintiff. The Order on Remand establishes the federal policy of not requiring unbundling of switches for new orders. The CLECs' interest in a practice the FCC has stated is "anti-competitive" has very little weight, if any, in balancing the harms. *Graphic Communications Union, Local No. 2 v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985) (Analyzing the defendants' motion for a stay of the district court's order compelling arbitration, the Seventh Circuit held that a stay would be improper because it would be contrary to "strong federal policy in favor of arbitrating disputes.").

Finally, the "status quo" will not be disrupted because the CLECs were on notice that no new UNE-P orders for switching may be accepted because the Interim Order stated that the "transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers at these rates."

Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783, at ¶ 29 (FCC Aug. 20, 2004). The Order on Remand also stated that the Order was effective immediately on March 11, 2005. Order on Remand at ¶ 235. Thus, while the CLECs are correct in arguing that the status quo established by the PSC orders will be disrupted by an injunction, the status quo established by the Order on Remand is maintained by an injunction.

C. Public Interest

BellSouth argues that the public interest is furthered by an injunction because it favors facilities-based competition, the ultimate goal of the Act. The defendants, on the other hand, argue that the public interest favors denying an injunction because the public may lose access to new services provided through CLECs. The defendants also state that the public interest in stability of contracts and in competition would be harmed. Additionally, the defendants argue that the public interest in an orderly transition and the PSC's ability to interpret interconnection agreements would be harmed by an injunction.

While entering an injunction may cause some disruption in service to CLEC customers, the FCC has stated the federal policy of encouraging facilities-based competition is disparaged by mandating unbundling services to CLECs. As such, the public interest favors

entry of a preliminary injunction that reflects that policy. Further, an injunction does no more harm to the PSC's ability to interpret federal telecommunications law or interconnection agreements, than do the processing of appeals for PSC orders authorized by the Act.

III. Conclusion

Based on the foregoing, the Court finds that all four factors weigh in favor of granting an injunction.

Accordingly, **IT IS ORDERED:**

(1) That Plaintiff's motion for preliminary injunction [Record No. 2] be, and the same hereby is, **GRANTED**; and

(2) That the defendants be, and the same hereby are, **ENJOINED** from enforcing the portion of the PSC orders dated March 10, 2005, that require BellSouth to continue to process new orders for UNE-P switching.

This the 22nd day of April, 2005.



Signed By:

Joseph M. Hood *JMH*

United States District Judge

EXHIBIT D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

BELLSOUTH TELECOMMUNICATIONS, INC.

PLAINTIFF

VS.

CIVIL ACTION NO. 3:05CV173LN

MISSISSIPPI PUBLIC SERVICE COMMISSION,
DORLOS "BO" ROBINSON, IN HIS OFFICIAL
CAPACITY AS THE CHAIRMAN OF THE PSC,
NIELSON COCHRAN, IN HIS OFFICIAL
CAPACITY AS THE VICE CHAIRMAN OF THE
PSC, AND MICHAEL CALLAHAN, IN HIS
OFFICIAL CAPACITY AS COMMISSIONER OF
THE PSC

DEFENDANTS

NUVOX COMMUNICATIONS, INC., KMC TELECOM
III, LLC, AND KMC TELECOM V, INC., XSPEDIUS
COMMUNICATIONS LLC ON BEHALF OF ITS OPERATING
SUBSIDIARIES XSPEDIUS MANAGEMENT CO. SWITCHED
SERVICES, LLC AND XPEDIUS MANAGEMENT CO. OF
JACKSON,

AND

COMMUNIGROUP OF JACKSON, INC. D/B/A
COMMUNIGROUP

AND

MCIMETRO ACCESS TRANSMISSION SERVICES LLC DEFENDANT-INTERVENORS

MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of plaintiff
BellSouth Telecommunications (BellSouth) for preliminary
injunction asking that the court enjoin the March 9, 2005 order
entered by the Mississippi Public Service Commission to the extent
that such order allows competitors to place new UNE-Platform

orders. Defendant Mississippi Public Service Commission (PSC) and the various intervenors filed responses in opposition to the motion. Based on its review of the parties' submissions and their arguments to the court at the April 8th hearing on the motion, the court concludes that BellSouth's motion should be granted.

On February 4, 2005, the Federal Communications Commission (FCC) released its Triennial Order on Remand (TRRO) in CC Docket No. 01-338 following remand in United States Telecom Association v. Federal Communications Commission, 359 F.3d 554 (D.C. Cir. 2004).¹ In the TRRO, among other things, the FCC established new unbundling rules regarding mass market local circuit switching, high-capacity loops and dedicated interoffice transport. All that is relevant to the present motion is its ruling as to mass market switching.² Prior to the TRRO, the FCC, pursuant to its authority under the Telecommunications Act of 1996, had consistently held that incumbent local exchange carriers (incumbent LECS), such as BellSouth, were required to provide access to the individual parts of their network systems - switches, loops and transport - on an unbundled basis and at prescribed prices, in order that the

¹ See Order on Remand, In re Unbundled Access to Network Elements, WC Docket No. 04-313, CC Docket, No. 01-338, 2005 WL 289015 (FCC Feb. 4, 2005).

² BellSouth's complaint in this cause also seeks relief based on provisions of the TRRO concerning the unbundling of loops and transport, but the present motion concerns only the FCC's ruling pertaining to access to switching.

competitive LECs would be in a position to effectively compete in the marketplace. These individual parts of the system are known as "unbundled network elements" or UNEs, and as BellSouth explains, access to unbundled switching is important because it makes it possible for competitive LECs to obtain the UNE Platform (or UNE-P), which consists of all the individual or piece-parts of the BellSouth network combined.

In its TRRO, the FCC ruled that the ability of competitive LECs to compete would not be impaired without access to unbundled switching, and concluded, therefore, that incumbent LECs would no longer be required to provide competitive LECs with access to unbundled switching. It specifically recognized that immediate implementation of its new rules posed a potential for disruption in service, and therefore established a twelve-month transition period, with accompanying transition pricing, for migration of competitive LECs' "embedded customer base" from UNE-P to alternate arrangements for service. The FCC determined that this twelve-month transition period would provide "adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition," and hence gave carriers twelve months from the date of the TRRO to "modify their interconnection agreements, including completing any change of law processes," to

implement the changes directed by the TRRO.³ The FCC stated in the TRRO, however, that the transition period it adopted applied "only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3). . . . "

Accordingly, on February 11, 2005, BellSouth sent out a "Carrier Notification" to all of its competitive LECs advising that as of March 11, 2005, the effective date of the TRRO, BellSouth would no longer accept orders for switching as a UNE item. A number of the competitive LECs responded by filing a Joint Petition for Emergency Relief with the PSC, asking that BellSouth be directed to continue to provide unbundled switching in accordance with its undertaking in its interconnection agreements until such time as the parties had completed the change of law process. In response, the PSC entered the order that is the subject of BellSouth's present motion, ruling that the parties were required to adhere to the change of law process in their

³ As dictated by the Telecommunications Act of 1996, 47 U.S.C. §§ 251 and 252, incumbent LECs and competitive LECs operate pursuant to "interconnection agreements" which must conform the legal requirements established by the FCC and which are approved, interpreted and enforced by state public utilities commissions. These interconnection agreements typically specify a change of law process by which the parties are required to engage in notice, negotiation and, if necessary, dispute resolution, to account for changes in the law that apparently occur with relative frequency in this area.

interconnection agreements and that until such time as the process, including arbitration, was completed, BellSouth would be required to continue accepting and provision competitive LECs' orders as provided for in their interconnection agreements.

BellSouth brought this action seeking declaratory relief and a preliminary injunction pending the court's expedited review of the PSC's order. BellSouth takes the position that the PSC's order is contrary to, and preempted by the FCC's TRRO, and it thus seeks an order enjoining all defendants from seeking to enforce the PSC's order.⁴

To prevail on its request for injunctive relief, the burden is on BellSouth to show "(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that irreparable injury will result if the injunction is not granted, (3) that the threatened injury outweighs the threatened

⁴ Reacting to BellSouth's motion, several of the competitive LECs moved to intervene and orders have been entered granting these motions. One purpose for which one of the intervenors, CommuniGroup of Jackson d/b/a Communigroup, sought to intervene was to file a motion to compel arbitration contending that this dispute is subject to arbitration under its interconnection agreement with BellSouth. Although there has been a significant amount of briefing on this arbitration issue by the parties, the court finds it unnecessary to dwell on this motion for it is manifest that CommuniGroup's position with respect to arbitration is misplaced. BellSouth claims, quite simply, that the PSC's order requiring it to continue to process new orders for UNE-P switching violates federal law and should be enjoined. There is no sense in which this dispute falls within the "arbitration" provision of any interconnection agreement. Accordingly, the motion to compel arbitration will be denied.

harm to defendant, and (4) that granting the preliminary injunction will not disserve the public interest." Mississippi Power & Light Co. v. United Gas Pipe Line Co., 760 F.2d 618, 621 (5th Cir. 1985) (citing Canal Authority of State of Florida v. Callaway, 489 F.2d 567 (5th Cir. 1974)).

The question of BellSouth's likelihood of success on the merits raises two issues: First, while the FCC's February 4, 2005 Order on Remand unequivocally provides for a "nationwide bar on [unbundled switching]," did the FCC intend that this aspect of its Order would be self-effectuating, and if so, was it within the FCC's jurisdiction to make the bar self-effectuating.

As to the first issue, a comprehensive review of all potentially relevant provisions of the TRRO demonstrates convincingly that the FCC envisioned that the bar on new-UNE-P switching orders would be immediately effective on the date established in the order, March 11, 2005, without regard to the existence of change of law provisions in parties' Interconnection Agreements. The TRRO makes clear in unequivocal terms that the transition period applies only to the embedded customer base, and "does not permit competitive LECs to add new customers using

unbundled access to local circuit switching."⁵ At ¶ 227, the Order recites,

We require competitive LECs to submit the necessary orders to convert their mass market customers to alternative service arrangement within twelve months of the effective date of this Order. This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local switching pursuant to section 251(c)(3) except as otherwise specified in this order. . . . We believe that the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or other conversions. Consequently, carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. By the end of the twelve month period, requesting carriers must transition the affected mass market local circuit switching UNEs to alternative facilities or arrangements. (Emphasis added).

Given the clarity with which the FCC stated its position on this issue, it is not surprising that the majority of state utilities commissions and courts, by far, having considered this issue have held, on persuasive reasoning, that the FCC's intent in the TRRO is an unqualified elimination of new UNE-P orders as of March 11, 2005, irrespective of change of law provisions in parties'

⁵ See TRRO ¶ 199; see also ¶ 5 ("This transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs.") (emphasis added); ¶ 127 (quoted in text).

interconnection agreements.⁶

⁶ See BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC, No. 1:05CV0674CC, 2005 WL 807062 (N.D. Ga. Apr. 5, 2005) (granting BellSouth's emergency motion for preliminary injunction against order of Georgia PSC to the extent the order required BellSouth to continue to process new orders for switching as an unbundled network element); Ind. Util. Reg. Comm'n, Order on Complaint of Indiana Bell Tele. Co., Inc. d/b/a SBC Ind. For Expedited Review of a Dispute with Certain CLECs Regarding Adoptino of an Amendment to Commission Approved Interconnection Agreements, Cause No. 4278, at 7, (March 9, 2005) ("We find the more reasonable interpretation of the language of the TRRO is the intent to not allow the addition of new UNE-P customers after March 10, 2005," irrespective of change of law processes provided by parties' interconnection agreements); Pub. Utilities Comm'n of Ohio, Order on Emergency Petition for Declaratory Ruling Prohibiting SBC Ohio from Breaching its Existing Interconnection Agreements and Preserving Status Quo With Respect to Unbundled Network Element Orders, Case No. 05-298-TP-UNC (March 9, 2005) (concluding that while SBC Ohio was required to negotiate and executed interconnection agreements as to embedded customer base, "[t]he FCC very clearly determined that, effective March 11, 2005, the ILECs unbundling obligations with regard to mass market local circuit switching . . . would no longer apply to serve new customers"); New York Pub. Serv Comm'n, Order Implementing TRRO Changes, Case No. 05-C-0203 (March 16, 2005) ("Based on our careful review of the TRRO, we conclude that the FCC does not intend that new UNE-P customers can be added during the transition period. . . ."); Pub. Util. Comm'n of Ca., Assigned Commissioner's Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders, Application 04-03-014 (March 10, 2005) (concluding that pursuant to the TRRO, "Verizon has no obligatin to process CLEC orders for UNE-P to serve new customers"); Pub. Util. Comm'n of Tex., Proposed Order on Clarification, Dkt. No. 28821 (March 8, 2005); New Jersey Bureau Pub. Util., Open Hearing, Implementation of the FCC's Triennial Review Order, Dkt. No. T003090705 (March 11, 2005) (refusing to require Verizon to continue providing unbundled access to New discontinued UNE orders as of March 11th); Rhode Island Pub. Util. Comm;n, Open Meeting, Adopting Verizon's Proposed RI Tariff Filing, Dkt. 3662 (March 8, 2005) (adopting tariff filing of Verizon which provide that Verizon would no longer accept orders for the subject elements (i.e., switching) as of March 11, 2005); State Corp. Commission of Kansas, Order Granting in Part and Denying in Part Formal Complaint and Motion for Expedited Order, Dkt. No. 04-SWBT-763-GIT (March 10, 2005)

Despite this, the PSC and defendant intervenors, relying primarily on § 233 of the TRRO, included in a section entitled "Implementation of Unbundling Determination," argue that the FCC's ruling as to new orders for unbundled switching is not self-effectuating but rather is subject to the negotiation process dictated by the parties' interconnection agreements. Paragraph 233 states:

We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent

(agreeing with incumbent LEC regarding the self-effectuating nature of the TRRO as to serving new customers," and observing that "[i]t does not make sense to delay implementation of these provisions by permitting an interconnection scheme contrary to the FCC's rulings to persist"); Mass. Dept. Of Telecommunications and Energy, Open Meeting on Complaint Against Verizon for Emergency Declaratory Relief Related to the Continued Provision of Unbundled Network Elements After the Effective Date of the Order on Remand, Dkt. No. 334-05 (March 22, 2005) (denying request for order requiring Verizon to continue to accept and process orders for unbundled network elements pursuant to their interconnection agreements and to require Verizon to comply with change of law provision); Mich. Pub. Serv. Comm'n, Order on Application of the Competitive 12 Local Exchange Carriers, Case No. U-14303, at 9 (March 29, 2005) (concluding that competitors "no longer have a right under Section 251(c)(3) to order [the UNE Platform] and other UNEs that have been removed from the [FCC's] list"); Me. Pub. Util. Comm'n, Order on Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection and Resold Servs., Dkt. No. 2002-682, at 4 (March 7, 2005) ("We find that the FCC intended that its new rules de-listing certain UNEs be implemented immediately rather than be the subject of interconnection agreement amendment negotiations before becoming effective.").

Contrary holdings have been issued only by the Kentucky and Louisiana Public Utilities Commissions, and the United States District Court for the Northern District of Illinois, Illinois Bell Telephone Co. v. Hurley, 2005 WL 735968, *6 (N.D. Ill. 2005).

with our conclusions in this Order. . . . Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.

In its March 16, 2005 Order Implementing TRRO Changes, the New York Public Service Commission considered and rejected an argument that ¶ 233 of the Order requires incumbent LECs to follow change of law provisions in interconnection agreements with respect to implementation of the bar on new orders for UNE-P switching, stating:

Although TRRO ¶ 233 refers to interconnection agreements as the vehicle for implementing the TRRO, had the FCC intended to use this process for new customers, we believe it would have done so more clearly. Paragraph 233 must be read together with the FCC directives that UNE-P obligations for new customers are eliminated as of March 11, 2005. Providing a true-up for new UNE-P customers would run contrary to the express directive in TRRO § 227 that no new UNE-P customers be added.

The court in BellSouth Telecommunications, Inc. v. BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC, No. 1:05CV0674CC, 2005 WL 807062 (N.D. Ga. Apr. 5, 2005), found the New York Commission's reasoning persuasive:

The PSC's reading of the FCC's order would render paragraph 233 inconsistent with the rest of the FCC's decision. Instead of not being permitted to obtain new facilities, as the FCC indicated should be the rule, see, e.g., Order on Remand ¶ 199, competitive LECs would be permitted to do so for as long as the change of law process lasts. Moreover, it is significant that the FCC expressly referred to the possible need to modify agreements to deal with the transition as to the embedded base, see id. ¶ 227, but did not mention a need to do so to effectuate its "no new orders" rule, see id. In sum, the Court believes there is a significant likelihood that it will agree with the conclusion of the

New York Public Service Commission that paragraph 233 "must be read together with the FCC directives that UNE-P obligations for new customers are eliminated as of March 11, 2005.." New York Order at 13, 26. Any result other than precluding new UNE Platform customers on March 11, would "run contrary to the express directive . . . that no [UNE Platform] customers be added" and thus result in a self-contradictory order." Id.

The court similarly finds this reasoning persuasive.⁷ Moreover, the notion that BellSouth should be made to negotiate over something which the FCC has determined it has no obligation to offer on an unbundled basis and which BellSouth has no intention of offering simply makes no sense. As was cogently observed by the Rhode Island Public Utilities Commission,

As a practical matter, it is not obvious to us what issues would remain to be negotiated concerning the section 251 UNEs de-listed by the FCC; the FCC has been clear that these UNEs are no longer required to be unbundled under section 251. The end result after going through the step of amending the interconnection agreements will be the same as enforcing the March 11th deadline immediately, albeit with some delay.

Adopting Verizon's Proposed RI Tariff Filing, Dkt. 3662 (R.I.PUC March 8, 2005).

⁷ It does so, as well, recognizing that there is authority to the contrary. See Illinois Bell Telephone Co. v. Hurley, 2005 WL 735968, *6 (N.D. Ill. 2005) ("Unlike ¶ 227, ¶ 233 of the TRO Remand Order does not address only existing customers. Rather, it falls under the general heading of 'Implementation of Unbundling Decisions' and mandates that the parties 'negotiate in good faith regarding any rates, terms, and conditions necessary to implement' the rule changes. This requirement presumably would include the substantially increased rate SBC now wishes to charge the CLECs seeking access to SBC's switches."),

The PSC and defendant intervenors next argue that even if the court were to conclude that the TRRO was intended to be self-effectuating, it still may not be given effect inasmuch as the FCC lacks jurisdiction to abrogate the terms and conditions of existing interconnection agreements regarding unbundled switching. In this vein, they argue that the parties' respective rights and obligations vis-a-vis BellSouth's provision of unbundled switching are governed exclusively by the parties' voluntarily negotiated interconnection agreements, over which the FCC has no jurisdiction. They further submit that even if the FCC did have jurisdiction to modify or abrogate the interconnection agreements, the TRRO does not reflect that the FCC made the requisite findings under the Mobile Sierra doctrine.

These arguments raise the question, highlighted by the parties' arguments, of whether the TRRO was intended to directly abrogate or modify the interconnection agreements, or whether, instead, enforcement of the TRRO would indirectly result in the modification of or abrogation of portions of the interconnection agreements. In either case, however, and despite the defendant and defendant-intervenors' protestations to the contrary, the FCC had authority to act in the manner it did.⁸

⁸ In the numerous rulings by state utilities commissions and courts addressing the FCC's Order, none to date has directly addressed whether the FCC had jurisdiction to impose its immediate bar to new orders for unbundled switching. Perhaps that is because no party has challenged the FCC's jurisdiction in this

If the FCC's Order is viewed not merely as a general regulation which bears on the proper interpretation of the interconnection agreements but as an outright abrogation of provisions of parties' interconnection agreements, consideration of its jurisdiction to act in the premises must take into account that interconnection agreements are "not . . . ordinary private contract[s]," and are "not to be construed as . . . traditional contract[s] but as . . . instrument[s] arising within the context of ongoing federal and state regulation." E.spire Communications, Inc., v. N.M. Pub. Regulation Comm'n, 392 F.3d 1204, 1207 (10th Cir. 2004); see also Verizon Md., Inc. v. Global Naps, Inc., 377 F.3d 355, 364 (4th Cir. 2004) (interconnection agreements are a "creation of federal law" and are "the vehicles chosen by Congress to implement the duties imposed in § 251"). It cannot reasonably be disputed that the provisions in the various interconnection agreements permitting the UNE Platform are there not because this was something the parties freely and voluntarily negotiated, but rather because this is what BellSouth was required to provide by law, and specifically by the FCC's earlier unbundling decisions. As BellSouth aptly notes, these provisions are vestiges of the now-repudiated FCC regime. See BellSouth v. MCIMetro Access, No.

regard. Indeed, the recent opinion by the Georgia District Court specifically noted that "the [Georgia] PSC does not dispute that the FCC has the authority to make its order immediately effective regardless of the contents of particular interconnection agreements." BellSouth v. MCIMetro Access, 2005 WL 807062, at 2.

1:05CV0674CC (N.D. Ga. Apr. 5, 2005) ("[I]t would be particularly appropriate for the FCC to take that action because it was undoing the effects of the agency's own prior decisions, which have been repeatedly vacated by the federal courts as providing overly broad access to UNEs, . . . and [i]n any event, any challenge to the FCC's authority to bar new UNE-Platform orders must be pursued on direct review of the FCC's order, not before this Court."); see also AT&T Communications of the Southern States, Inc. v. BellSouth Telecomms Inc., 229 F.3d 457, 465 (4th Cir. 2000) (observing that "many so-called 'negotiated' provisions (in interconnection agreements) represent nothing more than an attempt to comply with the requirements of the 1996 Act."); see also BellSouth Telecomms., 317 F.3d at 1298 (Anderson, J., concurring) (interconnection agreements are "mandated by federal statute" and even voluntary agreements are "cabined by the obvious recognition that the parties to the agreement had to agree within the parameters fixed by the federal standards). Thus, it is substantively inaccurate to characterize the FCC's action as an abrogation of private contracts, and more accurate to characterize it as the elimination of the legal requirements that had dictated the substance of the parties' regulatory agreements.⁹ And while

⁹ The Mobile-Sierra doctrine, invoked by defendant and defendant intervenors, holds that the FCC may abrogate or modify freely negotiated private contracts only if required by the public interest, and requires that the agency make a particularized finding that the public interest requires a modification to or an

the 1996 Telecommunications Act vested direct jurisdiction over interconnection agreements with the state utilities commissions, it did not divest the FCC of all authority with respect to such agreements. On the contrary, the Supreme Court has clearly held that the FCC has authority to issue rules and orders implementing all aspects of the 1996 Telecommunications Act. See Iowa Utilities Board, 525 U.S. at 380 (the Act "explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies"). And thus, "[w]hile it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements. . . these assignments . . . do not logically preclude the Commission's issuance of rules to guide the state-commission judgments," id. at 385. To the extent a state commission's judgment concerning the interpretation of an approved agreement conflicts with the FCC's interpretation of the FCC regulations, the FCC's interpretation controls under the Supremacy Clause. MCI Telecommunications Corp. v. Bell Atl. Pa., 271 F.3d 491, 516 (3d Cir. 2001) (stating that "[i]f the PUC's

abrogation of an existing contract. The court is not persuaded that the Mobile Sierra doctrine in this context is relevant, particularly given the court's conclusion that the interconnection agreements are not ordinary private contracts that were freely negotiated between the parties. However, even if the doctrine applied, the FCC's order reflects the Agency's finding that the bar on new UNE-P switching orders should take effect immediately since the continued use of the UNE-Platform "hinder[ed] . . . genuine facilities based competition and was thus contrary to public policy. See TRRO ¶ 218, 236.

interpretation conflicts with that of the FCC, the PUC's determination must be struck down"). Here, this court perceives that the FCC has determined as a matter of policy that the Telecommunications Act does not require the provision of unbundled switching and that the bar on new UNE switching orders is to be immediately effective without regard to change of law provisions in specific interconnection agreements. From its conclusion in this regard, in keeping with its plenary authority under the 1996 Act, it follows that the FCC's conclusion prevails over the PSC's contrary conclusion.

Certain of the intervenors, namely Communigroup and MCI, argue that BellSouth "still has to provide [UNE-Platform] under Section 271, regardless of the elimination of [the UNE-Platform] under Section 251."¹⁰ The New York Public Utilities Commission considered a similar argument by competitive LECs that even if the incumbent LEC no longer was obliged to provide access to UNE-P under the TRRO determination, it still had an obligation to continue providing such access pursuant to 47 U.S.C. § 271. The Commission rejected the argument, noting that in light of the

¹⁰ Section 271 of the Telecommunications Act appears in a section entitled "Special Provisions Concerning Bell Operating Companies," 47 U.S.C. §§ 271 to -276, which applies only to Bell Operating Companies (BOCs), all of which were formerly part of AT&T. Section 271 concerns the authority of BOCs to provide long distance services and provides, in general, that a BOC can only provide long distance services if it first meets certain requirements relating primarily to interconnection. 47 U.S.C. § 271(c).

FCC's decision "to not require BOCs to combine section 271 elements no longer required to be unbundled under section 251, it [was] clear that there is no federal right to 271-based UNE-P arrangements." This court would tend to agree. It would further observe, though, that even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly places enforcement authority with the FCC, which may "(i) issue an order to such company to correct the deficiency; (ii) impose a penalty on such company pursuant to subchapter V of this chapter; or (iii) suspend or revoke such [company's] approval" to provide long distance service if it finds that the company has ceased to meet any of the conditions required for approval to provide long distance service. Thus, it is the prerogative of the FCC, and not this court, to address any alleged failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long distance service.

Based on the foregoing, the court concludes that BellSouth has established a substantial likelihood that it will succeed on the merits of its claim.¹¹ The court also concludes that BellSouth

¹¹ As did the Georgia court in BellSouth v. MCIMetro Access, 2005 WL 807062, in concluding that BellSouth has sustained its burden as to the first requisite for injunctive relief, the court "does not reach the issue whether an 'Abeyance Agreement' between BellSouth and [Nuvox, KMC and Xpedius] authorizes those defendants to continue placing new orders. That issue is pending before the PSC, and this Court's decision does not affect the

has shown that it will suffer irreparable harm if injunctive relief is not granted. BellSouth has offered proof, unrefuted by the PSC or defendant intervenors, that it is losing more than 5,000 customers a month to UNE-Platform competitors. The opponents of BellSouth's motion argue that this loss can be adequately redressed by an award of monetary relief; yet as BellSouth points out, at the end of the case, this court cannot simply give BellSouth back the customers it has lost, and the monetary loss attending the loss of customers can be difficult, if not impossible to quantify. See Ferrero v. Associated Materials, Inc., 923 F.2d 1441, 1449 (11th Cir. 1991) (recognizing that the "Fifth Circuit has held that the loss of customers and goodwill is an 'irreparable injury,'" and agreeing that where there has been a loss of a party's long-time customers, the injury is "difficult, if not impossible, to determine monetarily") (citations omitted). See also BellSouth v. MCIMetro Access, 2005 WL 807062, at 3 (finding that BellSouth had demonstrated the existence of "very significant immediate and irreparable injury"); Illinois Bell Telephone Co. v. Hurley, 2005 WL 735968, at 7 (agreeing with SBC that "it will suffer irreparable harm because, even if its losses are quantifiable, there is no entity against which SBC could recover money damages").

PSC's authority to resolve it."

As for the issue of whether the threatened injury to BellSouth outweighs the threatened harm to the defendant intervenors, the court is persuaded that the competitors have alternative means of competing with BellSouth and that while "some competitive LECs may suffer harm in the short-term [if the requested injunction is granted], they will do so only if they intended to compete by engaging in conduct that the FCC has concluded is anticompetitive and contrary to federal policy." BellSouth v. MCIMetro Access, 2005 WL 807062 (observing that "paragraph 218 of the Order on Remand states that the UNE Platform 'hinder[s] the development of genuine, facilities-based competition,' contrary to the federal policy reflected in the Telecommunications Act of 1996."); see also State Corp. Commission of Kansas, Order Granting in Part and Denying in Part Formal Complaint and Motion for Expedited Order, Dkt. No. 04-SWBT-763-GIT (March 10, 2005) (stating that "any harm claimed by the CLECs to be irreparable today is no different from the harm that they must inevitably face in the relatively short term as a result of implementing the FCC's new rules. On the other hand, the sooner the FCC's new rules can be implemented, the sooner rules held to be illegal can be abrogated.").¹²

¹² The court would further note that the competitive LECs have been on notice since at least August 2004 of the possibility that a time would soon come when they would be precluded from placing new orders for switching UNEs. See Order and Notice of Proposed Rulemaking, Unbundled Access to Network Elements; Review

The fourth and final requisite for injunctive relief requires that BellSouth demonstrate that granting the preliminary injunction will not disserve the public interest. The FCC determined in its Order that there is a strong public interest in "providing . . . consumers with the technical innovation and competition which the FCC has predicted will result from the elimination of mandated unbundled switching," and indeed, it specifically declared that it would be "contrary to the public interest" to delay the effectiveness of its order. TRRO ¶ 236. The court is unpersuaded that there is a sufficient countervailing public interest to warrant denial of BellSouth's motion.

Conclusion

Based on the foregoing, it is ordered that BellSouth's motion for preliminary injunction is granted and the PSC is precluded from enforcing that part of its order requiring BellSouth to continue to process new orders for UNE-P switching.

SO ORDERED this 13th day of April, 2005.

/s/ Tom S. Lee

UNITED STATES DISTRICT JUDGE

of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 19 FCC Rcd 16783, ¶ 29 (2004) (proposing a transition plan that "does not permit competitive LECs to add new customers").

STATE OF SOUTH CAROLINA)
)
COUNTY OF RICHLAND)

CERTIFICATE OF SERVICE

The undersigned, Jeanette B. Mattison, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused the Response of BellSouth Telecommunications, Inc. to ITC^DeltaCom's Petition for Rehearing or Reconsideration of Order No. 2005-247 in Docket No. 2004-316-C to be served upon the following this August 19, 2005.

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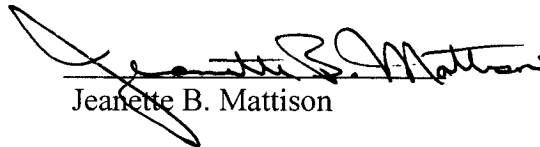
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